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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1693

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

GLEN M. CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED MAY 10, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

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Trial Testimony of Jack M. Spake in *United States* v. *Clarke*, No. A-69-69 (D. Alaska June 28-30, 1972) (Tr. 179-195)

[179] JACK M. SPAKE

being first duly sworn upon oath, testified as follows:

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: My name is—

THE COURT: Just a moment. I might state for your information that multiple counsel will follow the same order of examination throughout the entire trial. You will examine the witness, then it will be Judge McCarrey, then Mr. Lekisch and then it goes to Mr. Petersen and then Mrs. Short so that it will be the same rotation. That seems to be the only fair way to do it.

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: Jack M. Spake, S-p-a-k-e.

THE COURT: Counsel?

DIRECT EXAMINATION

BY MR. MAFFEI:

Q What is your residence address, Mr. Spake?

A 3837 Queens Way, Anchorage, Alaska.

Q What is your business or present occupation?

A I am a professional engineer, registered in the States of Indiana, Alaska, and also district engineer, Department of Highways, for the Central District.

Q For what period of time have you held that position?

[180] A I have been here two years, district engineer.

MR. McCARREY: Your Honor, at this time, based on my knowledge of Mr. Spake, I would be willing to stipulate that he is an expert in the engineering field.

MR. PETERSEN: I will so stipulate, also, your Honor.

MS. SHORT: I will so stipulate, your Honor.

MR. LEKISCH: I will so stipulate, your Honor.

THE COURT: His qualifications are stipulated to. You may then proceed directly to your case.

BY MR. MAFFEI:

Q You must be well known, Mr. Spake. I didn't know you had that high of qualifications.

A I have been called many things, including an engineer.

Q Have you ever traveled the road up to Glen Alps?

A Many times, yes.

Q And when has that been, and over what period of time has that been?

A I would say approximately four years, when I first became acquainted with the Glen Alps area. I am always searching for new highways for roads and et cetera.

Q All right, would you try to estimate for the Court how many times that you have been up there within the last four years?

A I would say at least 35 or 40 times.

Q Have those trips always resulted in your reaching Glen Alps itself?

[181] A Yes, sir.

Q Speaking particularly about the area that Mr. Clarke homesteaded, are you familiar with that?

A I know approximately where it is. It has been pointed out to me, yes.

Q Are you acquainted with the property owned by Dr. Bach?

A Yes, sir.

Q Are you acquainted with the property owned by Miriam Baker?

A Yes, sir.

Q Have you ever been up to those two residences?

A I have been in both of the—these residences, yes, sir.

Q You indicated that you, as a highway engineer, are always interested in searching for new roads or roadways?

A Yes.

Q Were you up there on state business?

A Yes, it has been, many times. We extended our main system on past, as far as we go in this area. We do not go completely up there. We stopped before we got into the sharp turns. There is a sign that says that the state ends at this point. And through many people, and also the Department of Natural Resources, Parks and Recreation, they are in turn looking for entrances to the Chugach State Park. That was part of my job and duty to assist the Department of Recreation to try to find the most feasible route. This particular route was considered at one time as an entrance. [182] As of now, I don't believe it has been in this particular category.

Q Perhaps I better have you step down to this board here. Have you seen this map here before, the contour map and topographic map?

A I am familiar with the general contours, somewhat, yes.

Q Could you step down to the map?

A Yes, sir.

MR. MAFFEI: May I approach the witness at the board?

THE COURT: Yes, you may. Speak up so that we can hear you.

BY MR. MAFFEI:

Q Stand back so the judge can see what we are doing here.

A Yes, sir.

Q The roadway that we are concerned about is this roadway here on this map, and at this point it enters the Tabbytite homestead and goes on up and makes the turn here (indicating) and then comes back on the Tabbytite homestead and up to the Clarke's and the Baker's residences. Now, have you been up that particular road?

A Yes, sir.

Q And are you familiar with the terrain and the topography as it is outlined on that map?

A In general, yes.

Q And in viewing that road itself, in your opinion as an [183] expert, would you state your opinion as to whether or not that road is a feasible spot or not?

A I would say in my observation and analysis of the contours as shown on this map, the road is about as well placed. I believe, as you could actually put a road of this type. At all times, when going up from A, you might say zero elevation, up to the elevation we are talking about here, 2,000 feet, you have to do a lot of research and you have to look, and usually these types of roads are planned, we find, these original trails are the best place to construct either a highway or an access to the property (indicating). The contours vary here, and I would say that from an engineering standpoint you would try to maintain a road at least on a 15 per cent grade, which is feasible, and anything over 15 per cent you will run into problems, and eventually here, because you are up above the snow line and you get into a lot of snow and ice conditions. And a 15 per cent grade is just about the maximum that you want to construct any type of road.

Q I will point out to you this section line that is on the north side of the Tabbytite homestead. Have you had a chance to observe that area extending from the road on east to the corner of that section?

A Along this particular section here, as you are coming up around this area, going to this corner here (indicating), [184] you are running into high and quite sudden elevation, but approaching more than a 15 per cent grade. And to try to maybe come up this way (indicating), this way you come to a creek area, undesirable because it seems to collect all the debris and peat and so forth.

Up here (indicating) the stream is going around here and you run into the problem of getting a more than 15 per cent grade in this particular area here. By coming up this way (indicating), swinging back and forth, they have utilized the natural terrain in order to get a road that I feel for this particular area is maybe the best location. If you want to spend an awful lot of money, yes, you could probably come up and lengthen

this, and it would take a lot more in order to get a 15 per cent grade.

But to construct a road or coming up from the back side here (indicating), or this trail going along here, and I think this is the Rabbit Creek Road, and to come up this way you are increasing the steepness of your road considerably more than this way or the road already constructed. This would be impossible down here to come up on this space with this particular area through here on into this area, here, either (indicating).

Q If we were to follow the section line, north section line, eastward to where it comes to a corner, following that section line itself, can you state your opinion as to whether [185] or not it would be feasible, practical and possible to build a roadway along that section line?

A It would be possible, but not feasible on account of the cost to construct it, here (indicating). I believe this, following the contour would be a little better, and to maintain probably the 15 per cent grade rather than coming up here, here you get into a much steeper grade up here (indicating). And like I said, it could be done. It would be quite costly.

Q Have you any estimate or opinion as to what the additional cost might be for something like that?

A This particular stretch of road, to come through—you are talking about this one particular area now?

Q Yes, about negotiating that rise and then turning to the right and going on and coming back to where you enter back into this property here (indicating).

A Well, you have a unique situation there where you are coming up and then you go back down again, you have to go this way—I would say the cost to come across and back around would be in the vicinity of $15,000 to $20,000. And you would have a snow problem here, you know, because of the heavy snowfall and the heavy winds. And any grade or obstruction you have causes the roads to block up with snow and it is quite costly to keep them open, or it open, in the winter time.

[186] Q You said, I think, that would probably increase the grade more than 15 per cent?

A Yes, according to the contour on the map as shown here, it would be 15 to 25 percent for this type of road.

Q It has been said that this area down here is steep as that area and this road has been built. Are you familiar with that hairpin turn?

A Yes, I would say you probably have a steeper grade than you do at this particular point.

Q And that area, however, follows a contour, does it not, that particular roadway?

A Yes, that is a general pattern on this type of road, you fish back and forth to gain your altitude and then try to maintain a uniform grade.

Q Would you have to follow the same type of procedure when—if you went up the section line here, or tried to?

A Well, I haven't climbed that. My observation has been from the road itself. You would have to probably fish back around and come back around this sharp curve in this particular area and come back over here and then proceed on up to the Glen Alps area. Your high point is right in this particular area (indicating), and from this point, then, you come over to this maximum of 2,600 feet in this particular area. Here is the last thousand at Dr. Bach's house area. It is very difficult to construct a road in this type of [187] terrain where you are—as you have seen from the development of this particular area there are several fishbacks back and forth and very severe grades and very hard to maintain in the winter time.

MR. MAFFEI: I don't think I have any other questions at this time, your Honor.

THE COURT: Mr. McCarrey?

MR. McCARREY: No questions, your Honor.

THE COURT: Mr. Lekisch?

MR. LEKISCH: No questions, your Honor.

THE COURT: Mr. Petersen?

MR. PETERSEN: I have several questions. Perhaps I could approach the witness.

THE COURT: You may.

CROSS EXAMINATION

BY MR. PETERSEN:

Q Mr. Spake, have you actually made any survey of what the grade would be along the line of this property here up the hill (indicating)?

A No, sir.

Q You have made no survey?

A Oh, visually, visual observation.

Q Is there any reason that you know of why the road could not turn to the left in this area here just east of where it is presently located and go right around the hill, following [188] along the contour?

A You come along over here (indicating), you are on the contour.

THE COURT: We can't hear you. You said something about following along, and we lost you.

THE WITNESS: Well, you would approach the area, the way the road is here, the question is would you continue along the section line?

BY MR. PETERSEN:

Q The question I asked now is, is there any reason why, when it got too steep, the contour couldn't be followed right around the hill?

A It is possible to come right around the elevation, then you are getting back steep downward slope in here (indicating).

Q Where is that?

A Right through this Y (indicating).

Q But that isn't indicated on the contour on the map, is it?

A You go from 2,100 contour down to approximately an area of 2,300, so the terrain does show you go down. You are probably around 100 foot elevation and it continues to slope down 1,000 feet onto the valley from this old trail that goes back in here. You contour and you do go down that far.

THE REPORTER: I cannot hear him.

[189] THE COURT: Mr. Petersen, I don't know what benefit the testimony is. Neither the court reporter nor I can hear the witness.

MR. PETERSEN: Would you please speak up, Mr. Spake?

THE WITNESS: Yes.

MR. PETERSEN: I do think it is necessary for him to stay by the exhibit.

THE COURT: I don't have any objection to that, counsel. The problem is the colloquy between counsel and the witness and excluded from everyone else.

MR. PETERSEN: I'm sorry, your Honor.

BY MR. PETERSEN:

Q Now, in this area beside the hill here where the elevation is marked 2,264, at the top of the hill, isn't it clear that the slopes are gentle, at least as shown on the contour map?

A It shows the difference of approximately 100 feet between this contour and this one going down (indicating). That would not be excessive, except you have to swing back again and you have to swing up and—going to this area (indicating) you go higher on up in here as you approach this particular area here. Like I said, it is not impossible to build around this area, but the cost, cost-wise if you are willing to pay the price, you can build a road any place. I said, and I will say it again, I think from my own personal [190] observation from the original lines put in here, to the best of my knowledge that is the best place and most economical place to place the trail.

Q This, of course, is without taking into consideration the cost of acquisition of land?

A Yes, sir. To go in and survey this type of road would be costly, too, and we didn't do that for our own personal benefit because we felt there would be no need for the type of highway we would build in this area. We did not further try to gain any additional knowledge from the point where we stopped was back here (indicating).

Q Do you have any knowledge as to whether it would be any more difficult to build a road in this area to have access to Mr. Clarke's property and to the old Spaulding homestead than it was to build a road right here (indicating)?

A I would say that—

MR. McCARREY: Your Honor, we do not have a record on "this" and "there". If there was some way counsel could identify it as to "this" and "there"—

THE COURT: I don't know how, counsel, not unless you want to have him make marks and put A and B or something.

MR. PETERSEN: I identified the first place by the Spaulding property, on the Spaulding property, and the other location is in the area where Mr. Clarke first commenced his road from the end of Huffman Road, I believe it is.

[191] BY MR. PETERSEN:

Q It appears to me that the contours are approximately the same distance apart where Mr. Clarke already built the road as they are over here on the Spaulding property where I am suggesting. Isn't that correct?

A I disagree, and because, as you can see, this particular area, the contours are closer together. As you get closer your elevations go up. It is much steeper. Here (indicating) they are all farther apart.

Q And here (indicating)?

A In that—no, that particular area, but here you have this whole area.

Q Would you stop just a moment. You said in that particular area, no, didn't you, and I want the court reporter to hear you say no, because you said it very low. Isn't that what you said?

A Well, I would say this particular area where you are coming through here now would be easier to develop a road than to come on around over the old Rabbit Creek road, I believe that is what they call it, due to the fact that this is not quite a vertical, but you have to fishback back and forth, back and forth, in order to get back to this area (indicating).

Q Would it be approximately the same, though, as to what Mr. Clarke did at the end of Huffman Road?

A Well, your contours indicate this part—here again, your [192] contours widen out as you come back this way, which makes it easier to construct the road (indicating).

MR. PETERSEN: I believe the witness may resume the witness stand. We have the last item entered into evidence—(Pause)

THE COURT: Eighteen, do you mean, counsel?

MR. PETERSEN: I believe that is the number, yes.

THE COURT: That is the last one.

MR. PETERSEN: May I approach the witness?

THE COURT: Yes, you may.

BY MR. PETERSEN:

Q Mr. Spake, I have handed you Exhibit 18 in this case. I notice it is from the state, Department—a letter from the state, Department of Highways, with a diagram attached. Are you familiar with this in connection with your employment? I know it is not signed by you.

A I am in communication with Dale Tubbs quite often.

Q Will you look at the diagram on a contour map attached to that letter and note alternate B. Now, do you know if that alternate is feasible?

A Well, I would like to say it would take further investigation before I would like to make a statement whether I would build a road there, as far as an official highway—an official of the highway department. It would have to be surveyed.

Q Would Mr. Tubbs have known, though?

[193] A Well, I wouldn't say.

Q He is in your department, is he not?

A He is not in my department. He is employed by the Department of Parks under Mr. Keenan.

Q All right.

A Like I say, this was considered at one time as an entrance into Chugach Park.

Q You don't know whether or not Mr. Tubbs had made a study before he wrote that letter and proposed that alternative?

A I would say he probably made a study, but how much of a study I would not care to comment on.

Q Referring again to the contour map over on the board, and in the area that I pointed to at the beginning of the road built by Mr. Clarke, where that road leaves Huffman Road just after the area where the state has the sign about "This road not maintained," is the rise there more than 15 per cent?

A I would not care to comment on that until I make a further detailed investigation, but from the contours it would indicate anywhere from 10 per cent to 20 per cent or greater in different places.

Q Do you have any less information about the per cent of the rise on the grade there than you have in the area that Mr. Maffei was asking you about, in the northeast corner of Mrs. Tabbytite's property?

[194] A I don't believe I quite understand the question.

Q In other words, you are just as qualified to estimate that grade as you are the grade you are estimating for Mr. Maffei, aren't you?

A Well, I would say yes.

Q Are you familiar with where the gas line and the Chugach Electric lines are located just a short distance to the east of the property that Mr. Maffei was pointing, and that I was pointing to on the map?

A I would say no. I know where they are up there, but the actual location—

Q Are you familiar with the road that follows those lines?

A I am familiar with the road going up there. As far as the utilities of any kind, the only utilities I am aware of is the telephone tower on top of the back of the property of Mrs. Baker.

Q Are you familiar with the road that you can travel on from the end of O'Malley Road on up along the utilities lines?

A I don't think I will answer that, because the next question, did I go up and observe the utility and telephone lines, I don't feel that I would be required to answer that question without further investigation.

Q You have not been over that road?

A Well, I will go back to my original statement. I have been on this road up to Glen Alps. That is the only road I have [195] been up to this particular—

Q You don't know there is another road that goes up there?

A I assume there are many roads in that whole area that go up to this particular area. I would not say.

MR. PETERSEN: I have no further cross examination.

THE COURT: Mrs. Short?

MS. SHORT: No cross examination.

THE COURT: Mr. Maffei?

MR. MAFFEI: No, your Honor.

THE COURT: May this witness be excused?

MR. McCARREY: Your Honor, may I ask a question based on Mr. Petersen's examination?

THE COURT: Yes, you may.

CROSS EXAMINATION

BY MR. McCARREY:

Q Mr. Spake, I think you testified that the road could be built to the north of the Tabbytite property at a greater expense; is that true? Did you not so testify?

A It would cost money, yes.

Q Now, here again, would you not have to also assume that the land was available for the building of the road?

A You would have to have a right of way.

MR. McCARREY: That is all

THE COURT: You may step down. Thank you, sir.

* * * *

Trial Testimony of Rodney Spendlove in *United States* v. *Clarke*, No. A-69-69 (D. Alaska June 28-30, 1972) (Tr. 209-219)

[203] RODNEY SPENDLOVE

being first duly sworn upon oath, testified as follows:

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: Rodney Spendlove, S-p-e-n-d-l-o-v-e.

THE COURT: Mr. Maffei?

DIRECT EXAMINATION

BY MR. MAFFEI:

Q Where do you reside, Mr. Spendlove?

A On Upper DeArmoun.

Q Is that anywhere near the Clark or Tabbytite properties?

A Well, my property borders on the west side of the Tabbytite property.

Q Your property borders on her west boundary?

A Yes, sir.

Q How much of the land do you have, or did you have there?

A Well, originally I had 98.9 acres.

Q Are you familiar or acquainted with that road that traverses across the Tabbytite property along the north and east parts of the property up to Glen Alps?

A I am not too familiar with it way up on the back end. Years ago I traveled by foot over that property.

[204] Q Over which property?

A All of it there, before I took my homestead, and while I was homesteading and while I was staking out Mrs. Tabbytite's property.

Q You helped her stake her homestead out?

A Yes, sir.

Q Did you have anything to do with the construction of that road across that portion of her homestead?

A No, sir, I didn't even know that it was even in there until about '61. I knew there that the road went to a switchback, but I had not been back in there.

Q Have you ever used that road for any purpose at all, traversed across it?

A I was over it one time.

Q When was that?

A I rode up with Craig Thomas the night of the election to the City of Glen Alps and to Mrs. Baker's house.

Q Have you ever been across the road any other time other than that?

A I have used the road up to—not that far. I have been just about to Murray's cabin, two or three times.

Q I am now talking about the road where it enters the Tabbytite homestead at this point (indicating).

A No.

Q And this point.

[205] A No, that area there only one time I have been over it.

Q How did you travel across it at that time?

A I was a passenger in Craig Thomas' car.

Q Have you ever cut any trees or disturbed the ground on Mrs. Tabbytite's homestead in that area?

A No way.

Q Would you have any reason to cross that portion of her homestead for any purpose? Did you own any land there, or was there any reason to cross her homestead?

A No reason unless I was invited as a guest to someone from up in that area. There is a state park right on the other part now—

Q Have you ever used that roadway to travel to the state park?

A No, but I was referring to when Mr. Spake was talking about a while ago.

Q Would you step down to the map, please, and I am going to turn to another subject matter now.

MR. MAFFEI: May I approach the witness?

THE COURT: You may.

BY MR. MAFFEI:

Q Before we start, I probably should ask you while you are still over here to speak up so everyone can hear you.

You indicated you had been over in the area and helped Mrs. Tabbytite stake it out; is that correct?

A Yes, I walked the area a number of times.

[206] Q Have you also been engaged in the road building business?

A For 19 years here in Alaska.

Q Has that been continuous?

A Yes, sir.

Q A continuous occupation?

A Yes.

Q And what—can you tell the Court what experience you have had, what roads you have built and the projects you have had?

A Yes. Well, I built two different sections on the Copper River Highway, and a half mile at Five Mile and right in front of the airport at Cordova, a little over three miles. And up here by the Chickaloon bridge I built the approach to that, and a turn, and I have built a number of these roads up in this particular area, too, that we are talking about.

Q Have you built roads out here to your homestead, down west of that?

A Yes, the subdivision part, I put in all the roads to that, plus the other roads for Tabbytite and from the Bureau of Land Management I had been given orders in order to prove my plat.

Q In looking at the map there you can see where the road is, can you not?

A This one here (indicating), yes.

Q Do you know of any other place or any other alternate route [207] where they could have placed that road?

A Well, actually, to gain access to this particular area (indicating) that was just about the best. And like running the pipeline through, why, the construction company used that because it was the most feasible.

Q I think we were talking—there was some testimony about—going up the north section line to the northeast corner of the property, do you know whether it would be feasible to construct a road up that line to that corner going right along the line, given 30 feet, and constructing it right up to the corner?

A Well, there is probably about a 120- or 140-foot rise from right here to the corner (indicating), and that would be in about 460 foot. I would say that would be about a 25 per cent grade, which is very, very steep, and they don't let you construct roads any steeper, normally, than about 11 per cent.

Q Could that be constructed in the space of 30 feet, 30 feet wide?

A Well, if you are coming straight up the hill you are still coming on a 25 per cent grade. It would be very difficult. Like over here on this switchback, I heard somebody mention it a while ago, I think Mr. Petersen asked the question, would you follow the contour, you are going parallel with the contours as they rise. There is just a gradual cut into the [208] contours.

Q What would it be doing, in effect, if you are going up the section line here (indicating)?

A Well, you are going to—just like it was explained a while ago. Here is the section line over here (indicating). This is just a—her north property line.

Q I meant her property.

A I don't think there can be any road constructed in this area since the park took over.

Q What is the nature of the land in those areas?

A I would say it's, in these areas here (indicating), it is swampy. Where she dropped down in here there is water settlement and here is your drainage basin, and your contours come down here to here. This is the Campbell Creek drainage areas. Also the drainage here, from here, this way, there is a high point here (indicating). It's moisture area right in here and swampy.

Q Let's talk about this area back up in here to the northeast of Mrs. Tabbytite's property and around the high place here (indicating). Is that land—what is that land in that area?

A Well, you mean in order to bring the road right up to here (indicating)?

Q I am talking now about around that point, following the contour, going around that point (indicating).

[209] A It is a little—as you see these lines here, it is a little marshy through there, too. There is lots of tundra and the water—it holds the water there and it is soggy, but it is a drainage area. And back here a little further is kind of a glacier in the mountain, up here (indicating).

Q Can you give us any opinion as to what the costs would be in building a road either around there or over the top as opposed to building it up where it is presently located?

A As you see here, your contours come through like this (indicating), and there is a—that means more valley, and what they have done is constructed the road up through here to reach this elevation and then come back around and follow this, these contours to where it could be too steep. Like I said before, coming right straight up here, then, you would have one heck of a rise and the cost—well, actually, it isn't feasible to begin with. But like Mr. Spake says, "If you want to go to the expense, you can build a road anywhere."

Q Would there be considerably more expense going up that way than there would be where the road is presently?

A Well, let's face it, the road is already in, so whatever cost would be laid out, that would be the extra cost, and of course, it would cost more, yes, originally had it come that way.

Q Originally, that is what I meant.

[210] A Oh, yes.

MR. MAFFEI: That is all the questions I have.

THE COURT: Mr. McCarrey?

MR. McCARREY: One question.

CROSS EXAMINATION

BY MR. McCARREY:

Q Mr. Spendlove, to build a road along the north boundary line of Mrs. Tabbytite's property, would it not be necessary to have an easement or right of way to build a road first?

A Most certainly. It either comes up from the—here (indicating), and you are going to have to have one in here from Murrays.

MR. McCARREY: That is all I have.

THE COURT: Mr. Lekisch?

MR. LEKISCH: No questions, your Honor.

THE COURT: Mr. Petersen?

MR. PETERSEN: I have a few questions.

CROSS EXAMINATION

BY MR. PETERSEN:

Q Mr. Spendlove, do you know of any physical reason why a road cannot come along the north boundary of Mrs. Tabbytite's property and to a point approximately at the 19—no, the 2,060-foot contour and then just curve left and follow along that contour and gradually rising around the hill?

A Like I said, it is kind of marshy in here. You got about [211] four times more room, probably closer to six times more room coming around this contour here. Right in here (indicating) you will find it is very swampy and marshy.

Q Yes.

A And it is not feasible to go through this way.

Q And this is very swampy and marshy right in here, also (indicating)?

A Well, they have already got this cut and ditched through here.

Q Yes, but the job is no greater or would be no greater here in this area that you described as swampy and marshy than it was over there?

A Yes, it takes a heck of a lot construction to even get around to this point, six times more construction.

Q You mentioned the gas company going over that road. Do you have personal knowledge of that, to construct that gas line?

A I have personal knowledge from this point down here (indicating).

Q Do you know if there is a road along the gas line?

A Yes. You come up here—I came up here one day and Mr. Taylor, you know, one of these fellows—

Q Just a moment. You may resume the witness stand. You started to mention about going somewhere with Mr. Taylor one day?

A Yes, sir. It was over further on upper O'Malley and up [212] above around—it doesn't even show—well, yes, sir, it does. No it doesn't, where we first went in. We came back up around, you know. Those homesteaders had an argument over the watershed. Well, he was one of them. He wanted me to do some building of roads for him.

Q And did you go up that road?

A No, I didn't go that road. We come back in through it. It was, oh, about a quarter section. It wasn't clear up in there, but we came up around the other side. We went up to where his property was, the property that he was homesteading.

Q Then you personally have not been all the way along the gas line road?

A No, not all the way along the gas line road, no.

Q Do you have knowledge whether it is possible to travel that in an automobile?

A No.

Q You don't have knowledge?

A Well, the gas—what I thought you were speaking about is the gas line road is beyond where Clarke's road is.

Q I am speaking about the road that goes along the utility lines from the end of O'Malley Road up to the vicinity of the Clarke property.

A Well, we didn't go all the way quite that far. We came up O'Malley and came up and back over and followed the pole line [213] back over to this road where it is on top.

Q You did go up from O'Malley?

A Yes.

Q There is a road there?

A Well, it dosen't go back over to the pole line. We were in a four-wheeled vehicle.

Q Now, referring to the area of the Spaulding homestead, do you know where that is?

A Yes, that is, I think, the one just south of Clarke's.

Q And referring to Mrs. Tabbytite's homestead, also, you built a road up the hill there, didn't you?

A Well, I cleared my right of way easement up to the quarter section.

Q And you built a road for Mrs. Tabbytite on her property to get up on top of the hill, didn't you?

A I constructed a trail up there.

Q That was passable in a vehicle?

A What kind of vehicle?

Q Well, I don't know. You must know.

A Passable in a Cat.

Q Was it passable in a four-wheeled drive?

A I had a four-by-four. When it was loaded down, I got up.

Q Did Mrs. Tabbytite drive up in it herself, do you know?

A I don't know.

Q You must have had some purpose in building this road there.

[214] A At the time, yes.

Q You must have been attempting to build a road that was usable.

A Well, we had plans on building down around the other way. It wasn't feasible at the time.

Q What kind of vehicle—do you know what kind of vehicle Mrs. Tabbytite had at that time?

A She had a four-wheel-drive.

Q A Jeep?

A Yes.

Q And would it be any more difficult to build a road up the hill on Spaulding's property than it was there?

A Well, what you got to look at is where you start from to the Spaulding property.

Q Well—

A You are still going to go through about six or eight people's property. You are going to have to gain easements from them in order to come up before you could even swing back again.

Q I believe I will have to ask you to approach the map again. Can you identify where your understanding is as to the Spaulding property?

A Right here (indicating).

Q And is it correct that a corner of it would be about right here (indicating)?

[215] A Right.

Q And is there a road what must be not more than 500 feet from the corner of that property?

A Well, then you have to gain permission from the individual here—

Q Do you know who that—

A —to construct here (indicating).

Q Do you know who that individual is?

A Don Rohaley.

Q All right.

A This road right in here is impassable right now. They are parking their vehicles on each side and walking in right today.

Q I believe you can resume the witness stand.

MR. PETERSEN: In fact, I have no further cross examination.

THE WITNESS: Who is—

MR. PETERSEN: I didn't ask you a question.

THE WITNESS: Oh.

THE COURT: Mrs. Short?

MS. SHORT: Just one or two.

CROSS EXAMINATION

BY MS. SHORT:

Q When you say "get permission," what type of permission is it you are understanding it is necessary to get—

[216] A You got to get an easement.

Q —to cross the property? Are you and engineer?

A No, ma'am, I am not an engineer.

Q What is your educational background?

A I have a high school diploma.

Q And you have a contractor's license?

A Yes, ma'am, general contractor's license.

Q How long have you had it?

A This time I have had it three years.

Q And when you said that you are involved in road construction, what type of work did you do in the construction of the roads?

A What type? All phases.

Q All phases. Were you in charge of the work?

A Yes.

Q Did you plat it, plan it?

A These particular roads here, I did, yes.

Q I am not talking about these roads. You referred to the highways that you built.

A Right. You use blueprints. You build it to their specifications.

Q Who makes the specifications?

A You are—if you are working for the highway department, department of highways or department of aviation.

Q In other words, you did not, yourself, make these—

[217] A Not the design, no.

Q You did not?

A No, they do that right in the office.

Q You worked from this, or from them?

A Right.

Q And did you make a number of roads on your own property?

A Yes.

Q And how did you make those roads?

A With a bulldozer.

Q With a bulldozer?

A Right.

Q And did any of those roads have a steeper incline than 25 per cent?

A They were only roads—I did one and that was the one that the Bureau of Land commission condemned, for Mrs. Tabbytite when I put another road so she could gain access at my expense.

Q You are saying then there was only one road you built that had an incline steeper than 25 per cent; is that correct?

A Yes.

Q Did you build any other road on your own property with inclines approaching 25 per cent?

A That's clearing, but not roads. They are trails to gain access with Cats.

MS. SHORT: Thank you. Mr. Spendlove. I have nothing [218] further.

THE COURT: Anything further, Mr. Maffei?

MR. MAFFEI: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MAFFEI:

Q Mr. Spendlove, I don't think I asked you about the possibility of building a road from this lower—whatever it is, Rabbit Creek—

A Right. It is called officially the Canyon, or I noticed the other day they have another sign up that says Upper DeArmoun.

Q Would it be—would there be any spot up there that you know of where it would be feasible to build a road from the Canyon Road up to the Clarke homestead?

A Well, you could come on up the canyon probably another mile or so and then go back, or you would have to make it probably—well, probably you would have to make a dozen switchbacks there, just zoom, zoom, zoom, and it would ruin the whole property.

Q Right in here (indicating)?

A Right. You can see how close those lines are together. And probably you got to that one dark area there, probably about 700-foot rise there.

Q You said that this road here is in fact impassable (indicating)?

A Yes, it is right now impassable. They are parked, the [219] four-wheel-drive vehicles, on each side of the road there. And then the people with two vehicles are in good shape. They can have one on one side and one on the other.

MR. MAFFEI: No other questions.

THE COURT: Anything further?

MR. McCARREY: No questions, your Honor.

MR. LEKISCH: No questions.

MR. PETERSEN: Nothing further, your Honor.

THE COURT: You may step down.

May this witness be excused?

MR. MAFFEI: Yes, your Honor.

THE COURT: All right.

Trial Testimony of William Wakeland in *United States* v. *Clarke*, No. A-69-69 (D. Alaska June 28-30, 1972) (Tr. 109-117)

[104] WILLIAM WAKELAND

being first duly sworn upon oath, testified as follows:

THE CLERK: Please state your full name for the record, and spell your last name.

THE WITNESS: William Wakeland, W-a-k-e-l-a-n-d.

MR. McCARREY: Your Honor, in deference of time, we would stipulate as to Mr. Wakeland's qualifications.

THE COURT: The record may so show.

MR. PETERSEN: I believe Mr. Wakeland's qualifications are set forth in the appraisal report also, and that has been admitted into evidence. May the appraisal report, which is Exhibit 9, be handed to Mr. Wakeland at this time?

[105] (Document handed to the witness.)

DIRECT EXAMINATION

BY MR. PETERSEN:

Q Mr. Wakeland, you have before you what has been entered as Exhibit 9 in the trial before the Court here. I believe this is an appraisal report made by you in the fall of 1970.

A Yes, sir.

Q Some time has passed since 1970. Do you have any knowledge as to whether the value figures you mention there would have decreased or increased in the interim?

A They most likely would have increased. This appraisal date was December 1, 1970, or approximately 18 months ago. At the time this was accomplished the land values in the region were increased approximately 20 per cent or more per year. I have just inquired what the current zoning status on this property is. It is still a proposed R-6 zone which would coincide with the restrictions placed within the Glen Alps municipal limit; 1.25

acre lots are the minimum lot. The proposed zoning apparently would not detract from the subject value.

MR. PETERSEN: I have nothing further to ask Mr. Wakeland.

THE COURT: Mrs. Short?

[106] CROSS EXAMINATION

BY MS. SHORT:

Q Since your appraisal has there been any change in the nature of the ownership of the land, to wit: In regard to Chugach National or the state park?

A Yes. At the time that I accomplished this appraisal, as I recall, the state park was in the planning stages. I don't think it was an official entity at that time. I guess it—still isn't, for that matter. I don't think the final action has been taken on the change in boundaries. For all practical purposes, it is a state park and it is my understanding it does border a portion of this property.

Q In your opinion, does that have any effect on the evaluation of the bordering land to the state park?

A I feel the lands bordering the state park are enhanced, and by that we will say reservation for public use rather than appropriation for some private development.

MS. SHORT: Thank you, Mr. Wakeland. Nothing further.

THE COURT: Mr. Maffei?

CROSS EXAMINATION

BY MR. MAFFEI:

Q Mr. Wakeland, can you tell us in dollars and cents, please, what is the value of the land? What is your estimate of the value of the land as taken as of this time?

A The part—the value of just the taking?

[107] Q Yes.

A My conclusion, the value of the part taken only, I was also asked to estimate a rental problem, but the

value of the part taken only, I have $2,500 as of December 1970.

Q What would be your opinion of its value today?

A That, I couldn't really advise. I have not made an investigation subsequent to December 1970. I would estimate that it is increased, but I don't know how much. I have not investigated that area to see what the ramifications are.

Q Do you have any knowledge as to what the percentage of increase has been in that particular area, in land value?

A Not since the date of my appraisal. At that time I was using the figure of 20 per cent per year to adjust prior sales, and this appeared, if anything, to be conservative. And judging by what we have seen of Greater Anchorage, the increase since then could be either more or less.

Q But you consider 20 per cent to be a fair increase per year?

A Yes, sir, I think that would probably be close.

Q What about the rental value? Has that increased, or is it the same?

A Well, I discussed here the rental rates on land ranging from six to as high as, I believe, 12 per cent, and I felt that that currently, which at that time was 1970, nine per cent appeared to be a reasonable land lease rate. I now have an opinion that that is probably a little high. I [108] think if anything our rates have tended to moderate, interest rates and mortgage rates, and of course, even the fact that the state now has an eight per cent usury law on interest rates which tends to also affect lease values.

Q What would be the rental value, then, in your opinion, at this stage?

A I would make the—you are just asking my opinion, now, without any research. It has not changed, because I think the rates are possibly down a little and the value is probably up a little, and they tend to offset one another.

Q So you would feel the rental would be, for the 12 years would have been $1,500 and the—whatever that amounts to per annum would have continued on from 1970 to this date?

A I think we would have to add a year and a half to that.

Q Yes.

A I have not done that. I am saying this value has tended to remain rather constant. It does not account for another year and a half use of the property at a rate that would be probably less than I used for 1970 and applied. And it is probably a little higher. I am not prepared to add that on.

Q Under your remark, Mr. Wakeland, on page 16 of your report you have indicated in your remarks that the value would be greater after the roads were built than it was before; is that correct?

[109] A That's correct.

Q Can you state why you made that statement?

A To try to clarify the—well, say the answers that I have in this report. For one thing, I was not sure of the law. I am not legally trained. I don't know whether we operate in a case like this under the laws of the federal government or the laws of the State of Alaska. I was asked to—well, say try to solve a problem through the appraisal process and it was necessary to make certain assumptions to do this. One of the assumptions was that I was solving it in the manner appropriate under Alaska law, in which case a special benefit may be a windfall to the property owner, legally so. What I am saying in the statement under remarks is that under a true before and after rule, which some states do have, there would be no compensation due her at all.

Q What you are, in effect, saying is that the property with the road on it is worth more than what the value of the property taken was; is that correct?

A That's correct.

Q Why is the property worth more with the road on it?

A Because, to be put to any beneficial use or to the highest and best use, that is a better choice of words, the

property must have access. And roads are rather expensive, as we saw here for this 1,500 feet or so. The road seems to be placed in such a manner that it would in fact serve beneficially a [110] part of the property.

Q What did you find the highest and best use of the property to be?

A Potential subdivision, small tracts, in keeping with the restrictions imposed by the municipality.

THE COURT: Would you repeat your answer?

THE WITNESS: I found the best use to be the potential or future subdivision into small tracts.

THE COURT: Anything further?

MR. MAFFEI: May I have a moment, your Honor?

THE COURT: Yes.

BY MR. MAFFEI:

Q (Pause) From your report, Mr. Wakeland, it appears that you took a first-hand view of the property; is that correct?

A That is true.

Q And did you do that by vehicle, or on foot?

A On foot.

Q Did you traverse all of the property on foot?

A No, obviously not, but I traversed enough of it to —well, say inspect it all visually and take photographs of it.

Q When you saw all of the property, did you look at the entire 160 acres of Mrs. Tabbytite's property?

A Well, virtually. I didn't set foot on the whole 160 acres, counsel. That would be a week's undertaking. I located the northeast corner of the property which was rather [111] difficult to find, and the corner and the center and the lines that were brushed through on several of the dimensions of the property. And of course, was through the area where Mrs. Tabbytite has her cabin in the ravine area and all over that plateau area and all across the top of it there. So I feel I fairly well inspected the property, yes.

MR. MAFFEI: May the witness step down here to the map?

THE COURT: Yes.

BY MR. MAFFEI:

Q You will have to step on the other side.
A Yes.
Q What I am particularly interested in is knowing whether you traversed the area where the road is located on Mrs. Tabbytite's property, and then to the east of there, of that (indicating). Were you able to see that?
A Here (indicating)?
Q No, to the east of the road where it enters Mrs. Tabbytite's property.
A Here?
Q Yes.
A Yes, I was trying to locate this point right here (indicating).
Q Do you know what type of terrain it has there?
A It is quite steep.
MR. McCARREY: Your Honor, I am unable to hear the [112] witness.
THE COURT: The answer was, "quite steep."
MR. McCARREY: Thank you.

BY MR. MAFFEI:

Q When you viewed the area and viewed the roadway, would you be able to state whether or not there is any other place or area where the road could be built so that it could be completed to Glen Alps, other than where it is now?
A I felt there was.
Q Where was that?
A Well, I would say it would be optional. The roadway could come farther to the east and could go up the other side of this little drainage place here (indicating) or across the creek down here somewhere. It would not be practical to put a road any farther east on this hillside. It could fall most anywhere within the area here until you get into the steep contours, but this was not necessarily the only route to follow. Perhaps it was as good as any other.
Q The areas you designate are all across Mrs. Tabbytite's property; is that correct?

A I thought you had reference to Mrs. Tabbytite's property. You mean in general, any other way to serve Glan Alps?
Q Yes, other than going through Mrs. Tabbytite's property.
A I felt at the time there was an alternative to build a road on a moderate contour back here (indicating). It would be [113] longer and be more expensive. I think that is a question of degree. It could be done at a higher or a slightly higher expense, in my layman's opinion. I don't have any information as an engineer on what the soil conditions are, but the slope would not be unreasonable.
Q That would be going around that—whatever it is there, knob or hillside?
A That would be continuing up here at a moderate rate and switching back here (indicating). This is not a bad grade. I have been all over here on a motorcycle. I know the country quite well. In fact, there is a road down there, down through here now, a trail.
Q You may resume the stand. Do you know who owns the property on the west of Glen Alps, on the east of Glen Alps and bordering the east line of Mrs. Tabbytite's property?
A I believe it is all state land on the east.
Q Do you know whether or not the state now allows vehicular traffic in that part?
A I don't know what the current regulations are. I don't think they are established. They are still going through the hearing stage.
MR. MAFFEI: I have nothing further. No further questions.
THE COURT: Mr. McCarrey?
MR. McCARREY: Just two, your Honor.

[114] CROSS EXAMINATION

BY MR. McCARREY:

Q You indicated, Mr. Wakeland, that the road, were it constructed to avoid coming across Mrs. Tabbytite's property, would be somewhat longer in serving Glan Alps than it is now as so constructed. Could you tell us approximately how much longer it would be?

A No, I could not.

Q You also indicated, Mr. Wakeland, that it would cost more to build it on this longer route. Do you have an opinion as to how much more it would cost?

A No, I do not.

Q In your experience as an appraiser, have you subdiveded property?

A No, I don't think so.

Q Well, you must have some background or knowledge to act as an appraiser, since you have also indicated the highest and best use would be a subdivision for small tracts; is that correct?

A We work with them constantly.

Q Do you know of any other route that you could recommend to the Court and counsel that road could take to better improve the Tabbytite property for a subdivision than that one which is now constructed?

A Yes. I might point out that I pointed that out in my report. [115]It tends to be wasteful of a little of her property. The general alignment, I think, serves a subdivision. There are some minor problems. You will notice at the southeast corner of the property the road cuts back into it. There is no benefit to the subject property there. It should have either gone below a reasonable site or missed all together. That is wasting part of the property right there. And there is a couple other minor adjustments that might be made in that road to better serve a potential subdivision, but in general the alignment appears about what a person might have put in there if they were subdividing.

Q Mr. Wakeland, assuming that you would construct another road to serve the area, as to better utilize the

entire property, would that proposed road cost more than what the original road cost to get in there?

A I don't know. I am not an engineer. We don't have a route surveyed. I don't know whether a right of way is practical or not. I did not examine that aspect.

Q So then you have to further qualify your answer by stating that maybe the cost of the new road to better serve the property would be more than the increased value of the property; is that a logical conclusion?

A Would you restate that again?

Q Well, assuming that you constructed another road that would better serve the property than the one now constructed, as [116] you indicated, without the knowledge as to what the additional road may cost, isn't it possible and probable that the cost of the new road into the property would exceed the increased value to the property were it placed in another place?

A Which part are you speaking of?

Q You testified that, as I recall, the road did not serve the southeast corner. Now, this is not—this is south and this is east (indicating). You are referring to down here?

A No, the extreme southeast corner. There is only one.

Q This one?

A That is southwest.

Q This one?

A Yes.

Q Now, with that in mind, since you don't know what it would cost to construct another road in to serve this area as indicated, isn't it possible and probable that the cost of constructing a road so it could serve this area might exceed the increased value to the property by having a road in to it?

A (Pause)

Q You don't know?

A I don't understand the question, let alone know the answer to it.

MR. McCARREY: Very well, no further questions.

[117] MR. LEKISCH: No questions.

THE COURT: Anything further, Mr. Petersen?

MR. PETERSEN: I have nothing further, your Honor.

MS. SHORT: Nothing further, your Honor.

THE COURT: You may step down.

MR. PETERSEN: May Mr. Wakeland be excused from further attendance, your Honor?

THE COURT: Yes, you may be excused. Be sure to leave the exhibits.

* * * *

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 61-60

IN THE MATTER OF THE INCORPORATION OF THE CITY OF GLEN ALPS, ALASKA, AS A MUNICIPAL CORPORATION OF THE THIRD CLASS

ORDER OF INCORPORATION

This matter came on for hearing at Anchorage, Alaska, on the 4th day of May, 1961, before the Honorable James M. Fitzgerald, Superior Court Judge. A certificate of the result of election having been filed disclosing that a majority of the qualified electors favored incorporation, and setting forth the results of the election of trustees, and an affidavit having been filed disclosing that notice of election had been given according to law, it is

DECLARED that the following described community be, and it hereby is, incorporated as the CITY of GLEN ALPS, a municipal corporation of the third class. The boundaries of the said City are as follows:

> All of the whole Section 30, Township 12 North, Range 2 West, Seward Meridian, Alaska, more particularly described as follows:
>
> Starting at an iron pipe with brass cap, which is the common corner between Sections 25 and 26 of Township 12 North, Range 3 West, Seward Meridian, Alaska, and Sections 30 and 31 of Township 12 North, Range 2 West, Seward Meridian, Alaska, and which is 400 chains South of latitude 61° 09′ 49″ North and longitude 149° 43′ 06.5″ West; thence South 89° 58′ East, a distance of 75.86 chains to a

iron pipe with brass cap, which is the common corner between Sections 29, 30, 31 and 32, Township 12 North, Range 2 West, Seward Meridian; thence North 0° 08′ West, 80 chains to an iron pipe with brass cap, which is the common corner between Sections 19, 20, 29, and 30, Township 12 North, Range 2 West, Third Meridian; thence North 89° 54′ West, a distance of 75.68 chains, to an iron pipe with brass cap, which is the common corner between Sections 24 and 25 of Township 12 North, Range 3 West, Seward Meridian, and Sections 19 and 20 of Township 12 North, Range 2 West, Seward Meridian; thence in a Southerly direction, a distance of 80 chains to the point of beginning, which area contains approximately 606.18 acres.

In accordance with the Certificate of Election Judges it is

DECLARED that the following, having received the highest number of votes for trustee, are elected to such office:

Craig Thomas
Glenn M. Clarke
Donald Spaulding
Howard Murray
Miriam Clarke

DATED at Anchorage, Alaska, the 8th day of June, 1961.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
Superior Court Judge
Third Judicial District
Anchorage, Alaska

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

/s/ Jo Hare 8/4/76
WAYNE W. WOLFE
Clerk—Trial Courts
State of Alaska
At Anchorage

Municipality of Anchorage
Department of Law
Richard W. Garnett
Municipal Attorney
Richard A. Weinig
Assistant Municipal Attorney
630 West 5th Avenue
Anchorage, Alaska 99501

[Filed Aug. 6, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A-69-69 Civil

UNITED STATES OF AMERICA, PLAINTIFF

BERTHA MAE TABBYTITE, INTERVENOR

GLEN M. CLARKE, ET AL., DEFENDANTS

AFFIDAVIT OF DAVID McCLELLAND

STATE OF ALASKA)
THIRD DISTRICT) ss.

I, DAVID McCLELLAND, being duly sworn do attest to the following things:

1. I am employed by the Municipality of Anchorage as Maintenance Operations Manager of Public Works.

2. Since unification, the Municipality of Anchorage has maintained the road from Upper Huffman to what is known as Glen Alps as a service area road of the Municipality of Anchorage. This includes the road within Section 30 which crosses Mrs. Tabbytite's property

and which was maintained and used as a public roadway by the City of Glen Alps prior to unification.

DATED this 6 day of August, 1976.

/s/ David McClelland
DAVID MCCLELLAND

SUBSCRIBED AND SWORN to before me this 6th day of August, 1976.

/s/ Richard A. [Illegible]
Notary Public in and
for Alaska

My Commission Expires:
11/6/76

Brief for the United States 2-3, *United States* v. *Clarke*, No. 77-2571 (9th Cir.)

QUESTION PRESENTED

Whether a federal statute authorizing state condemnation of Indian trust allotment land permits the state to dispense with formal condemnation proceedings and simply occupy the land.

STATUTE INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, provides in part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

STATEMENT

The United States, attempting to enforce this Court's mandate in *United States* v. *Clarke*, 529 F.2d 984 (1976), sought injunctive relief closing a trespass road across an Indian trust allotment unless the Municipality of Anchorage filed a condemnation action, taking the land (Appendix A to this brief, p. 1). The district court denied the injunction. It held that the Municipality of Anchorage had condemned the land by occupying it, and that the Municipality's only remaining liability was for monetary claims of the Indian allottee when and if she chose to sue the Municipality for inverse condemnation (Appendix A to this brief, pp. 2-3).

The facts in this case are set out in this Court's opinion in *United States* v. *Clarke*, *supra*, 529 F.2d at 985-986. They are, that in 1958 Glen Clarke, to gain access to his 80-acre homestead, unilaterally and illegally constructed a road across the land of Bertha Mae Tabbytite, which land is now held by Tabbytite under an Indian

trust allotment patent.[1] Beginning in 1961, Clarke subdivided his land into 40 parcels. Clarke and his successors have been using the road ever since. An over ten-year effort by Tabbytite and the United States to close the road, or have it acquired and paid for by eminent domain has been unsuccessful to date. Anchorage claims to be occupying the road now, though no specific document or physical act is relied on to support the assertion.

There is no dispute but that federal law, Section 3 of the Indian Appropriation Act of 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, authorizes the State of Alaska (or here its authorized political subdivision, the Municipality of Anchorage) to condemn that portion of the Tabbytite allotment necessary for the road. Anchorage refused to file a formal condemnation action, asserting that its occupation of the road constitutes inverse condemnation. The district court agreed that inverse condemnation by occupation satisfied the Indian Appropriation Act of 1901, *supra*, 25 U.S.C. 357. The United States seeks to have the road closed unless a formal condemnation action is brought. Most immediately at stake is the date of taking (which is the date of valuation) of the land, which may make a significant difference in the size of the award to Tabbytite if Anchorage actually does condemn the land. Also at issue is the speed with which Tabbytite obtains any visible relief.

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[1] As set out in this Court's 1976 opinion, at the time the road was first cut, Tabbytite was in possession as a homestead entryman. She later elected to take the land under an Indian trust allotment because of Clarke's frequent contests of her patent applications.

SUPREME COURT OF THE UNITED STATES

No. 78-1693

UNITED STATES, PETITIONER

v.

GLEN M. CLARKE, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 304846 117